IN THE LABOUR COURT OF LESOTHO

CASE NO LC 13/97

HELD AT MASERU

IN THE MATTER OF:

TANKISO MOKHASI	1ST APPLICANT
MOJALEFA METSING	2ND APPLICANT
LEKHOOA E. MOTA	3RD APPLICANT
TSEKO RAMAFIKENG	4TH APPLICANT
LIKOMO LEKHUTLE	5TH APPLICANT
LEHLOHONOLO CHOKOLA	6TH APPLICANT

AND

WATER AND SEWERAGE AUTHORITY	RESPONDENT

JUDGMENT

This is an application in which the six applicants seek the setting aside of the termination of their contracts and the declarator that they were confirmed in their respective positions following the completion of their probation. The applicants allege that they were employed by the respondent. They state further that they were promised to be confirmed at the end of a four months probation.

At the expiration of the four months the applicants allegedly approached one Nkhata Nkhahle about the promise to employ them permanently. Nkhahle allegedly told them that he was awaiting an answer presumably from management, at the beginning of 1995. In July 1995, Nkhahle allegedly informed the applicants that he had been sent by the respondent to inform them that they were now permanently employed. He further told them that he would inform them as to when they would go to the office of the personnel manager to fill up forms.

It is common cause that the applicants were never confirmed. It appears, however, that in July 1995 and May 1996, a request was made to employ the applicants on a permanent basis, but this request was never acceded to. In December 1996 each of the six applicants received a letter informing him/her that;

> ***"please be informed that your engagement with the Authority is herewith terminated. You are therefore given one month's notice with effect from Monday 16th December 1996 - Friday 17th February 1997. As part of your notice period you are required to take your annual leave that is due to you. Any balance that there may be will be paid in lieu of."***

The respondent in its answer admits employing the applicants. It says however that their employment was from day to day. The respondent denies employing the applicants on a four months probation, at the end of which they would be admitted to the permanent establishment. Regarding the promises allegedly made by Nkhahle the respondent pleads ignorance thereof but states that even if Nkhahle may have talked to the applicants as alleged, he had no authority to speak about such matters.

This court is inclined to agree with the respondent's submissions. There is not the slightest evidence to support applicants' claim to have been employed on the terms they allege. They contend themselves with wild and unsubstantiated allegations of promises by persons whom they have not bothered to obtain affidavits from.

Section 75 of the Labour Code Order 1992 (the Code) provides that "an employee may initially be employed for a probationary period not exceeding four months." The requirement for probation is therefore, not mandatory as the word "may" is used. It is absolutely in order for an employer not to require his employees to serve a period of probation. This court cannot therefore, declare that the applicants were confirmed as they have failed to prove that they were employed on probation, at the successful completion of which they would be confirmed.

Mr. Mosito contended that the applicants' dismissal should be quashed for want of sufficient notice. He argued that the notices given to the applicants were insufficient as they were required to take their leave as part of their notices. He averred further that they were infact owed their leaves which they had not taken. Mr. Matooane for the respondent argued that the applicants were paid their leave as per annexure "PM" to the Answer.

We again are in agreement with Mr. Matooane's submission. In their statement of case, the applicants state in paragraph 14 of their Originating Application,

> ***"applicants were requested to take their annual leaves. For only 5th applicant did take it. The rest refused."***

The net effect was that the applicants served their one month notice exclusive of their annual leave. They were paid for that month and as respondent avers in its answer they were also paid for their outstanding leave which they refused to take. It is not necessary for us to decide here whether they were correct or not in refusing to take the leave as they did.

Mr. Mosito argued further that the applicants were not given a hearing prior to their termination. He contended that the respondent being an employer exercising a public function ought to have treated the applicants fairly. In its answer the respondent denied the applicants were entitled to be heard before they were terminated. It went on to state that, "the terms of applicants' appointments required that applicants be given one month's notice of their termination. This has been complied with. They were given sufficient notice in terms of the Laws of Lesotho." (see paragraph 7 of the Answer).

Section 63(1) of the Code governs periods of notice. In terms of paragraph (a) of that section an employee who has been continuously employed for one year or more is entitled to one month's notice. Five of the applicants had been employed for thirty months while the sixth applicant had been employed for fourty four months. They were thus all given adequate notice in terms of the law.

However Section 66(1) provides that "an employee shall not be dismissed whether adequate notice is given or not, unless there is a valid reason for termination of employment...." It is common cause that the letter of termination does not disclose any reason whatsoever for the termination of the applicants' contracts. To this end the terminations are contrary to Section 66(1) of the Code and as such unfair.

It is important to note that the respondent is a public body exercising a public function. It is now trite law that public employers are enjoined to act fairly at all times. The often quoted passage from the judgment of Mahomed JA in the celebrated case of Koatsa Koatsa .v. The National University of Lesotho C. of A No.15 of 1986 is worth referring to:

> ***"A private employer exercising a right to terminate a pure master and servant contract is not at common law obliged to act fairly. As long as he gives the requisite notice required in terms of the contract, he can be as unfair as he wishes. He can act arbitrarily, irrationally or capriciously. The position of an employer performing a public function is not the same. The official or officials who exercise a discretion to terminate a contract of employment by giving to the employee concerned the minimum period of notice provided for in the contract cannot act capriciously, arbitrarily or unfairly."***

The principles of natural justice dictate that for the decision to terminate the contracts of the applicants to be fairly exercised, they ought to have been given a hearing.

Much emphasis seem to have been placed on the claim that the employees in question were casual labour. As it was suggested to Mr. Matooane during argument, there was nothing casual about the applicants' employment if resort is had to the definition of the word "casual." The Concise Oxford dictionary defines "casual" as meaning something accidental, something which is not regular, but occasional. If regard is had to the nature of the work of the applicants it did not fit this definition. Even though they were not employed on permanent and pensionable terms, they were not, however, casual labour. Their contracts were as Mr. Matooane correctly conceded contracts without reference to limit of time as defined in Section 62(2) of the Code.

These contracts could be terminated upon giving the requisite statutory notice. However such notice had to be preceded by a hearing as the termination of their contracts clearly prejudiced their rights to work. As a public employer the respondent was enjoined to act fairly against the applicants. To terminate their employment in the manner done by the respondent's personnel manager, was clearly an arbitrary and capricious act as neither the reason was given for the termination nor the necessary hearing. In the circumstances we are of the view that the termination of the contracts of the applicants was both substantively and procedurally unfair.

AWARD

The prayers of the applicants are granted as follows:

(a) The purported termination of the contracts of employment of the applicants is set aside;

(b) The applicants are reinstated in their jobs with the respondent.

(c) Costs shall be costs in the cause.

THUS DONE AT MASERU THIS 15TH DAY OF DECEMBER, 1998.

L.A LETHOBANE
PRESIDENT

M. KANE
MEMBER **I AGREE**

T. KEPA
MEMBER **I AGREE**

FOR APPLICANT : **MR MOSITO**
FOR RESPONDENT: **MR MATOOANE**